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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER

PEARSE, ADEPEJU OMOLOLA

ART UNIT PAPER NUMBER

1761

DATE MAILED: 08/10/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/697,800

Applicant(s)

BERNARD ET AL.

Examiner

Adepeju Pearse

Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 19 May 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 30-50 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 30-50 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☒ None of:
1. ☒ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Election/Restrictions

1. Applicant's election with traverse of group I (claims 30-50 and 60) in the reply filed on 5/19/2006 is acknowledged. The traversal is on the ground(s) that the process of heating being done using gas or electric heating is mere speculation and the fact that the principle subclass is different because of the manner in which the Patent Office classification exists does not mean that the search area is different. This is not found persuasive because of reasons stated in the previous office action.

The requirement is still deemed proper and is therefore made FINAL.

Claim Objections

1. Claim 60 is objected to because of the following informalities: Applicant has not provided the status of claim 60 in the set of claims filed 5/19/2006. However, the claim was added as a new claim in the set of claims filed 6/24/2004. For examining purposes, the claim is regarded as a cancelled claim. Appropriate clarification required.

Specification

1. The disclosure is objected to because of the following informalities:

The following guidelines illustrate the preferred layout for the specification of a utility application. These guidelines are suggested for the applicant's use.

Arrangement of the Specification

As provided in 37 CFR 1.77(b), the specification of a utility application should include the following sections in order. Each of the lettered items should appear in upper case, without underlining or bold type, as a section heading. If no text follows the section heading, the phrase "Not Applicable" should follow the section heading:

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- (a) TITLE OF THE INVENTION.
- (b) CROSS-REFERENCE TO RELATED APPLICATIONS.
- (c) STATEMENT REGARDING FEDERALLY SPONSORED RESEARCH OR DEVELOPMENT.
- (d) THE NAMES OF THE PARTIES TO A JOINT RESEARCH AGREEMENT
- (e) INCORPORATION-BY-REFERENCE OF MATERIAL SUBMITTED ON A COMPACT DISC (See 37 CFR 1.52(e)(5) and MPEP 608.05. Computer program listings (37 CFR 1.96(c)), "Sequence Listings" (37 CFR 1.821(c)), and tables having more than 50 pages of text are permitted to be submitted on compact discs.) or
REFERENCE TO A "MICROFICHE APPENDIX" (See MPEP § 608.05(a). "Microfiche Appendices" were accepted by the Office until March 1, 2001.)
- (f) BACKGROUND OF THE INVENTION.
 - (1) Field of the Invention.
 - (2) Description of Related Art including information disclosed under 37 CFR 1.97 and 1.98.
- (g) BRIEF SUMMARY OF THE INVENTION.
- (h) BRIEF DESCRIPTION OF THE SEVERAL VIEWS OF THE DRAWING (S).
- (i) DETAILED DESCRIPTION OF THE INVENTION.
- (j) CLAIM OR CLAIMS (commencing on a separate sheet).
- (k) ABSTRACT OF THE DISCLOSURE (commencing on a separate sheet).
- (l) SEQUENCE LISTING (See MPEP § 2424 and 37 CFR 1.821-1.825. A "Sequence Listing" is required on paper if the application discloses a nucleotide or amino acid sequence as defined in 37 CFR 1.821(a) and if the required "Sequence Listing" is not submitted as an electronic document on compact disc).

Appropriate correction is required.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) The invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

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3. Claims 30-32, 34, 38-42, 44-47 and 49 are rejected under 35 U.S.C. 102(e) as being anticipated by Barrett et al (U.S. Pat. No. 6,531,174). With regard to claim 30, Barrett et al disclose a gelatin -free chewy sweet product comprising a hydrocolloid, a crystalline sweetener isomalt (isomaltulose) and a non-crystalline sweetener including maltitol (abstract, col 4 lines 45-54). It is inherent that the product is a soft caramel as it discloses similar ingredients as instantly claimed.
4. With regard to claim 31, Barrett et al disclose hydrocolloids including oxidized starch, gum arabic, locust bean gum, gellan gum, guar gum, xanthan gum, pectin, agar, etc (col 2 lines 23-28, col 4 lines 4-8).
5. With regard to claim 32, Barrett et al disclose that the product may include one or more additional hydrocolloid. It is inherent that the mixture is any of the above-cited hydrocolloids including gum arabic and gellan gum as instantly claimed.
6. With regard to claim 34, Barrett et al disclose noncrystalline sweetener including maltitol, starch hydrosylate (col 4 lines 46-49, col 5 lines 30-33) and that a sugar substitute can replace all the sugar (sucrose) in the product.
7. With regard to claim 35, Barrett et al disclose that a chewy sweet product comprising a mixture of sugars, sugar substitutes and or glucose syrup (col 5 lines 30-33).
8. With regard to claim 38, Barrett et al disclose that the chewy product may contain fat from 0.5 to 20% by weight, which is within applicant's recited range (col 5 lines 12-15).
9. With regard to claim 39, Barrett et al disclose that the chewy product may contain an emulsifier (col 5 line 19).

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10. With regard to claim 40, Barrett et al disclose that the chewy product may contain proteins and a suitable amount would range from 0.1% to 5% (col 5 lines 19-23).
11. With regard to claim 41, Barrett et al disclose milk protein as a protein component of the chewy product (col 5 line 19).
12. With regard to claim 42, Barrett et al disclose that the chewy product may contain coloring agents (col 5 line 38).
13. With regard to claims 44-45, Barrett et al disclose that the chewy product may contain natural or artificial flavors, flavor enhancers including essential oils (col 2 lines 62-64).
14. With regard to claims 46-47, Barrett et al disclose that the chewy product may contain from 2 to 20% water by weight, which encompasses applicant's range.
15. With regard to claims 49, Barrett et al disclose a chewy confection product containing vitamins, minerals, etc (col 3 lines 60-65).

Claim Rejections - 35 USC § 103

16. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

17. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.

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2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

18. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

19.

20. Claims 30-31, 34-39, 42-46 and 48-50 are rejected under 35 U.S.C. 103(a) as being unpatentable over Willibald-Ettle et al (US. Pat. 6,458,400). With regard to claim 30, Willibald et al disclose a soft confection that may contain alginates, cellulose, vegetable gums or gelatin, a crystalline sweetener isomaltulose (col 1 lines 65-66), and a noncrystalline sweetener hydrogenated starch hydrolysate, maltitol, etc (col 2 lines 64-67). One of ordinary skill in the art would expect that any of the cited binders could replace gelatin because they are obvious substitutes utilized for the same function and thereby produce a gelatin-free product.

21. With regard to claim 31, Willibald et al disclose cellulose, alginates, etc as suitable binders. It would be obvious to one of ordinary skill in the art to expect that these would function as instantly claimed because they are similar components.

22. With regard to claim 34, Willibald et al disclose noncrystalline sweeteners including maltitol syrup, hydrogenated starch hydrolysate, etc (col 2 lines 64-67, col 6 lines 26-29) and the

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confection can be sugar free (col 2 lines 48-50). It would be obvious to one of ordinary skill in the art to expect that these would function as instantly claimed because they are similar components.

23. With regard to claim 35, Willibald et al disclose that the noncrystalline sweetener includes starch hydrosylates and can comprise sucrose (col 2 lines 48-50, lines 64-67). It would be obvious to one of ordinary skill in the art to expect that these would function as instantly claimed because they are similar components.

24. With regard to claims 36-37, Willibald et al disclose that the soft confection can comprise intensive sweeteners including aspartame, cyclamate, saccharin, sucralose, etc (col 3 lines 25-30). It would be obvious to one of ordinary skill in the art to expect that these would function as instantly claimed because they are similar components.

25. With regard to claim 38, Willibald et al disclose vegetable fat at 5.8% in a soft confection formulation (see tables 3 & 4). It would be obvious to one of ordinary skill in the art to expect that these would function as instantly claimed because they are similar components.

26. With regard to claim 39, Willibald et al disclose a soft confection comprising an emulsifier (see example 1). It would be obvious to one of ordinary skill in the art to expect that these would function as instantly claimed because they are similar components.

27. With regard to claims 42-43, Willibald et al disclose a soft confection comprising natural and synthetic colorants including chlorophyll, titanium dioxide, indigo carmine, etc (col 3 lines 34-44). It would be obvious to one of ordinary skill in the art to expect that these would function as instantly claimed because they are similar components.

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28. With regard to claims 44-45, Willibald et al disclose flavoring agents including menthol, peppermint oil, eucalyptus, etc (col 3 lines 18-24). It would be obvious to one of ordinary skill in the art to expect that these would function as instantly claimed because they are similar components.

29. With regard to claim 46, Willibald et al disclose a soft confection containing water at 5% (see tables 3 & 4). It would be obvious to one of ordinary skill in the art to expect that these would function as instantly claimed because they are similar components.

30. With regard to claim 48, Willibald et al disclose a soft confection comprising flavoring agents, an emulsifier, an intensive sweetener, vegetable fat, and a polysaccharide including alginates and cellulose as stated above. It would be obvious to one of ordinary skill in the art to expect that these would function as instantly claimed because they are similar components.

31. With regard to claims 49-50, Willibald et al disclose a soft confection comprising clinical actives including hexylresorcinol, dextromethorphan, benzocaine, cetylpyridinium, etc (col 3 lines 10-16). It would be obvious to one of ordinary skill in the art to expect that these would function as instantly claimed because they are similar components.

32. Claims 33, 36-37, 43, 48 and 50 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barrett et al in view of Cherukuri et al (US 2003/0026826) and Willibald-Ettle et al (U.S. Pat. No. 6,458,400). With regard to claim 33, Barrett et al failed to disclose a ratio for gellan gum and gum arabic. However, Barrett et al disclose that a mixture of hydrocolloids could be utilized and that the relative amount of each component could be from about 10 to 90% (col 4 lines 1-3) in order to produce a long lasting cohesive chew. The ratio is seen to be an obvious

experimental variable based on consumer preference such as providing a long lasting cohesive chew.

33. With regard to claims 36-37, Barrett et al failed to disclose an intensive sweetener for the chewy sweet product. However, Cherukuri et al teach a sugar-free chewy product that may contain intensive sweeteners including saccharin, aspartame, glycyrrhizin, sucralose, etc ([0093]) as in claim 37 for sweetening. It would be obvious to one of ordinary skill in the art to modify the teaching of Barrett et al with Cherukuri et al by incorporating an intensive sweetener in order to provide a sugar-free product but sweetened chewy product.

34. With regard to claim 43, Barrett et al failed to disclose the type of coloring agents to utilize. However, natural and synthetic dyes are well known in the art for coloring food products and it would not involve an inventive step to utilize any of the types or similar coloring agents as instantly claimed as evidenced by Willibald-Ettle et al which teaches colorants including titanium dioxide, indigo, riboflavin, chlorophyll, etc (col 3 lines 35-44).

35. With regard to claim 48, Barrett et al disclose a gelatin-free chewy sweet product comprising flavoring agents, an emulsifier, fat, and a hydrocolloid as cited above, but failed to disclose an intensive sweetener. Cherukuri et al teach a sugar-free chewy product that may contain intensive sweeteners including saccharin, aspartame, glycyrrhizin, sucralose, etc ([0093]) as in claim 37. It would be obvious to one of ordinary skill in the art to modify the teaching of Barrett et al with Cherukuri et al by incorporating an intensive sweetener for the purpose of providing a sugar-free product but sweetened chewy product.

36. With regard to claim 50, Barrett et al failed to disclose a medicinal active such as dextromethorphan, hexylresorcinol/menthol, phenylpropanolamine, dyclonine, menthol


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eucalyptus, benzocaine or cetylpyridinium in the chewy sweet product. However, Cherukuri et al teach a sugar-free chewy confection comprising therapeutically active substances including cough and cold medications, which includes dextromethorphan as an active. It would be obvious to one of ordinary skill in the art to modify Barrett et al with the teaching of Cherukuri et al by incorporating these actives for therapeutic purposes. Besides it is well known in the art to utilize medicinal actives in confections as evidenced by Willibald et al which teach soft confections containing hexylresorcinol, dextromethorphan, benzocaine, cetylpyridinium, phenylpropanolamine, etc (col 3 lines 10-16).

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Adepeju Pearse whose telephone number is 571-272-8560. The examiner can normally be reached on Monday through Friday, 8.00am - 4.30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.


MILTON I. CANO
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 1700

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

A handwritten signature in black ink, appearing to read 'Peju Pearse', with a stylized, cursive script.

Peju Pearse